ATTORNEY FOR APPELLANT:

SCOTT KING
Scott King Group
Gary, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ISAIAH N. ESKEW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0709-CR-457
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0606-MR-6

June 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Isaiah N. Eskew appeals his convictions for Reckless Homicide, a Class C felony, and Possession of a Firearm on School Property, a Class D felony, following a jury trial. Eskew raises three issues for review:

1. Whether the State presented sufficient evidence to rebut Eskew's claims of self-defense and defense of a third person.

2. Whether the evidence is sufficient to support his conviction for reckless homicide.

3. Whether the evidence is sufficient to support his conviction for possession of a firearm on school property.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 6, 2006, Eskew, his brother Evan, and his cousin Trovoy Terry attended the graduation ceremony at Wirt High School in Gary. Also attending the graduation were Tywon Newsome and Deanna Edwards, Evan's former girlfriend. Tension was apparent between Newsome and Evan. Eskew and Evan each had separate conversations with Newsome to alleviate the tension, but those conversations were unsuccessful.

Eskew told Evan that a fight was likely and, therefore, that Evan might want to get his gun. At some point, Eskew and Evan went to Evan's car in the school parking lot, where Evan retrieved a gun. Terry drove up, Eskew entered Terry's vehicle, and Evan entered his own vehicle. Newsome and Edwards then arrived in their car, pulling up to Evan's vehicle.

Eskew then stood at the rear of Evan's car. Newsome took his shirt off and approached Evan. Newsome and Evan began fighting while Evan was still in his vehicle.

During the fight, Eskew saw a gun fall to the ground. In response to Evan's request, Eskew picked up the gun. Newsome's girlfriend testified that Eskew shot twice at Newsome while Newsome was struggling with Evan. Newsome then charged at Eskew, who still held the gun. As the two struggled, Evan jumped on Newsome, and the three fell into Newsome's open car. As the three were "tussling" for the gun, a third shot was fired. Transcript at 110. Evan ran away, but Eskew and Newsome continued to struggle on the ground outside the car for a short while. Then Eskew ran away.

Suffering from a gunshot wound to the chest, Newsome drove himself toward the school security guards but lost control of the vehicle. After being transferred to a hospital, Newsome died of the chest wound. He had also sustained two grazing wounds, one to his ear and one to his lip. The gun that fired the fatal shot was later recovered from Newsome's car. Meanwhile, Eskew entered Terry's vehicle, and Terry drove to the police by the auditorium. Eskew told the police that there had been a shooting, and the police took him into custody.

The State charged Eskew with murder and possession of a firearm on school property. A jury trial was held on June 6 through 8, 2007. The jury found Eskew not guilty of murder, guilty of the lesser included offense of reckless homicide, and guilty of possession of a firearm on school property. On July 27, 2007, the trial court sentenced Eskew to four years for reckless homicide and eighteen months for possession of a firearm on school property, to be served concurrently and suspended to four years' probation. Eskew filed a motion to correct error, which the trial court denied without a hearing. Eskew now appeals.

DISCUSSION AND DECISION

Issue One: Sufficient Evidence of Defense Theories

Eskew contends that the State failed to rebut his claims of self-defense and defense of a third person.[1] A valid claim of defense of oneself or another person is a legal justification for an otherwise criminal act. Ind. Code § 35-41-3-2(a). To prevail on such a claim, the defendant must show that he "(1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm." Hobson v. State, 795 N.E.2d 1118, 1121 (Ind. Ct. App. 2003), trans. denied.

When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. Id. The standard of review for a challenge to the sufficiency of the evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Id. We neither reweigh the evidence nor judge the credibility of witnesses. Id. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. Id.

The evidence shows that Newsome stripped off his shirt before the fight began and threw the first punch at Evan. The two began "holding each other down" and

[1] The State argues that Eskew's claim is not properly before us because self-defense cannot be asserted as a defense to reckless homicide. However, the State concedes that there is no Indiana law directly supporting that assertion. The Alabama case the State cites in support is not binding on us because it is foreign law and based at least in part on Alabama statutory law. See Lacy v. State, 629 So. 2d 688, 689 (Ala. Crim. App. 1993), cert. denied, 629 So. 2d 691 (Ala. 1993); see also Ala. Code § 13A-6-4 (2008) (proscribing criminally negligent homicide; amended in 1979 to repeal the "imperfect defense" provision allowing partial justification for offense based on, for example, self-defense). Regardless, Eskew does not prevail on his contentions, and we need not address this issue.

"wrestling," with Newsome holding Evan down. Transcript at 105-06. Evan could not get up and yelled to Eskew, "get my gun, get my gun" which was on the ground. Transcript at 107. Eskew, who had been standing nearby, retrieved the gun and cocked it. There was no evidence that Newsome, who was bare-chested, was armed in any way. Newsome was still holding Evan down when Evan yelled, "shoot this n*****." Id. Eskew aimed at Newsome's head and fired. Newsome continued to hold Evan down, and Eskew fired again.

Newsome then threw Evan into a neighboring car and charged at Eskew, who still held the gun. The two struggled and fell into Newsome's open car door. In the car they struggled for the gun, and Evan jumped on top of Newsome. The gun discharged, and Evan ran. For a short while, Eskew and Newsome continued to struggle outside of the car, with Eskew standing over Newsome. Eskew then ran.

Newsome drove himself and his girlfriend toward the school security guards but lost control of the vehicle along the way. In the struggle with Eskew, Newsome had sustained a gunshot wound to the chest and two graze wounds to his head. Newsome was transported to a hospital, where he died a short while later from his chest wound. The gun that fired the fatal shot was recovered from Newsome's car.

Eskew argues that the State failed to rebut his claims of self-defense and defense of a third person. But Eskew had the burden of showing evidence supporting his defense theories before the State was obliged to rebut that evidence. See Hobson, 795 N.E.2d at 1121. When the jury convicted Eskew of reckless homicide, it either discounted his defense theories or found that the State had rebutted them. Eskew's appeal on this issue

amounts to a request that we reweigh the evidence, which we cannot do. See Hobson, 795 N.E.2d at 1121. As such, Eskew's argument that the State failed to negate any of the necessary elements of self-defense or defense of a third person is without merit.

Issue Two: Reckless Homicide

Eskew next contends that the evidence is not sufficient to support his conviction for reckless homicide. Upon review of claims of insufficient evidence, this court will neither reweigh evidence nor judge the credibility of witnesses. Garrett v. State, 756 N.E.2d 523, 531 (Ind. Ct. App. 2001), trans. denied. We consider only the evidence favorable to the verdict and reasonable inferences to be drawn therefrom. Id. Where there is substantial evidence of probative value from which the trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. Id.

Here, the evidence most favorable to the verdict shows that Newsome and Evan were wrestling or struggling when Eskew picked up the gun, pointed it at Newsome's head, and fired twice. Newsome then threw Evan aside and charged at Eskew, who still held the gun. Newsome and Evan began to struggle and fell into Newsome's open car. While struggling in the car, a third shot was fired. Evan and Eskew then ran from the scene. In all, Newsome had sustained the fatal gunshot wound to the chest and two graze wounds to his head.

Eskew argues that "[t]here was no evidence that the shots fired when Eskew was responding to Newsome's assault upon Evan yielded the fatal wound. There is insufficient evidence that the shots fired during Newsome's assault upon Eskew were the product of Eskew's as opposed to Newsome's actions." Appellant's App. at 10. We

agree with Eskew that the evidence does not clearly indicate when Newsome sustained the fatal chest wound or whether Newsome ever held the gun. However, there is also no evidence that anyone other than Eskew held or fired the gun during the struggles in the parking lot that evening. Eskew's argument amounts to a request that we reweigh the evidence, which we cannot do. Garrett, 756 N.E.2d at 531.

Eskew also argues that

> any arguable disregard of harm did not, in the context of the evidence in this case, involve a substantial deviation from acceptable standards of conduct either as a general proposition or, particularly, when such standards are viewed against the legislatively established standards pertaining to one's right to defend oneself or others.

Appellant's App. at 11. To the extent Eskew is arguing self-defense or defense of a third person, we have already determined that either Eskew's defense theories do not find support in the evidence or that the State presented sufficient evidence to rebut those claims. And to the extent that Eskew is arguing that his conduct did not substantially deviate from acceptable standards in general, again, his argument amounts to a request that we reweigh the evidence, which we cannot do. See Garrett, 756 N.E.2d at 531. Thus, the evidence is sufficient to support Eskew's conviction for reckless homicide.

Issue Three: Possession of a Firearm

Eskew also contends that the evidence is insufficient to support his conviction for possession of a firearm on school property. Specifically, he argues that he presented evidence supporting the common law defense of necessity, and the State failed to disprove that defense. The common law defense of necessity has evolved over the years and is often referred to as the "choice of evils" defense. Toops v. State, 643 N.E.2d 387,

389 (Ind. Ct. App. 1994). Although the confines of the necessity defense vary from jurisdiction to jurisdiction, the central element involves the emergency nature of the situation. Id. That is, under the force of extreme circumstances, conduct that would otherwise constitute a crime is justifiable and not criminal because of the greater harm which the illegal act seeks to prevent. Id.

The following requirements have traditionally been held to be prerequisites in establishing a necessity defense: (1) the act charged as criminal must have been done to prevent a significant evil; (2) there must have been no adequate alternative to the commission of the act; (3) the harm caused by the act must not be disproportionate to the harm avoided; (4) the accused must entertain a good faith belief that his act was necessary to prevent greater harm; (5) such belief must be objectively reasonable under all the circumstances; and (6) the accused must not have substantially contributed to the creation of the emergency. Patton v. State, 760 N.E.2d 672, 675 (Ind. Ct. App. 2002).

Here, the evidence shows that Eskew took possession of the firearm at Evan's request. Eskew found the gun on the ground near Evan and Newsome, who were fighting. Newsome's argument that he picked up and fired the gun to prevent an even greater harm amounts to a request that we reweigh the evidence, which we cannot do. See Garrett, 756 N.E.2d at 531. Thus, Eskew's argument that his possession of the firearm on school property was based on necessity must fail.

Affirmed.

DARDEN, J., and BROWN, J., concur.